United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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361

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,344

UNITED STATES OF AMERICA,

Appellee,

v.

EMANUEL CLEMONS,

Appellant.

Appeal from a Judgment of the United States District Court for the District of Columbia.

REPLY BRIEF FOR APPELLANT

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Table of Contents

TABLE OF AUTHORITIES

I. Clemons' Maximum Sentence in This Case is One Year Imprisonment

The Government's brief considers proof of a prior conviction a "formality" where the prosecuting attorney, defense attorney and the judge, that is, everyone except Clemons, were on notice "that because of a previous robbery conviction appellant Clemons was subject to sentence of up to ten years." (Appellee's Brief, p. 12). This is precisely the practice proscribed by this Court in Jackson v. United States, 95 App. D.C. 328, 221 F.2d 883 (D.C. Cir. 1955).

No proof of prior conviction was offered. As a result, Clemons was sentenced from three to ten years on a record which permitted a maximum sentence of one year. Under these circumstances the Supreme Court has held that the legal portion of the sentence, in this case one year, is effective, but the excess is void. United States v. Pridgeon, 153 U.S. 48, 62 (1893). In Pridgeon the Supreme Court stated as an established principle that:

> "Where a court has jurisdiction of the person and of the offence, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess open to question and attack. In other words, the sound

> rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offence, and only void as to the excess when such excess is separable, and may be dealt with without disturbing the valid portion of the sentence."

This principle remains unquestioned today. Browning v. Crouse, 356 F.2d 178 (10th Cir.), cert. denied, 384 U.S. 973 (1966); United States v. Taylor, 305 F.2d 183, 187-8 (4th Cir.), cert. denied, 371 U.S. 894, rehearing denied, 371 U.S. 943 (1962).

Clemons is serving a valid one year sentence, and in this posture the case cannot, as the Government suggests, be remanded to the District Court for resentencing. To do so would place Clemons in double jeopardy.

Under the prior offender statute and the procedure followed by the District Court, sentencing for a period in excess of one year requires a hearing at which the Government had a burden to present proof of Clemons' prior offense. Though given an opportunity to do so, the Government failed to introduce any proof. The Supreme Court has stated that jeopardy attaches either when the Government presents insufficient evidence or when it fails to offer evidence required in the proceeding. Downum v. United States, 372 U.S. 734, 737-38 (1962). Thus the Government's failure to offer proof in a criminal sentencing proceeding cannot now be cured by granting

the prosecution a second chance at a new hearing.

In the circumstances of this case a second hearing on sentencing for the same conviction is as much a violation of the Fifth Amendment as a second trial for the same offense. In Ex Parte Lange, the Supreme Court declared:

> "For of what avail is the constitutional protection against more than one trial if there can be any number of sentences pronounced on the same verdict? Why is it that, having once been tried and found guilty, he can never be tried again for that offence? Manifestly it is not the danger or jeopardy of being a second time found guilty. It is the punishment that would legally follow the second conviction which is the real danger guarded against by the Constitution. But if, after judgment has been rendered on the conviction, and the sentence of that judgment executed on the criminal, he can be again sentenced on that conviction to another and different punishment, or to endure the same punishment a second time, is the constitutional restriction of any value? Is not its intent and its spirit in such a case as much violated as if a new trial had been had, and on a second conviction a second punishment inflicted?
>
> "The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offence as from being twice tried for it." 85 U.S. 163, 173 (1873).

A Court "may amend a sentence so as to mitigate the punishment but not so as it increase it" because "to increase the penalty is to subject the defendant to double punishment for the same offense in violation of the Fifth Amendment." United States v. Benz, 282 U.S. 304, 307 (1930).

For these reasons, a second hearing on sentencing cannot be ordered to cure the defect in the record before this Court.

II. Denial of Clemons' Motion for Continuance Because of Prejudicial News Was Error

The Government argues in effect that the Constitutional standards for a fair trial fashioned by the Supreme Court in Sheppard v. Maxwell, 384 U.S. 333 (1966), Estes v. Texas, 381 U.S. 532 (1965) and Rideau v. Louisiana, 373 U.S. 723 (1963) relate to news coverage of the notorious crime or the notorious criminal defendant. Appellant Clemons certainly was not the subject of notoriety nor was his alleged possession of a pistol a notorious crime. The prejudice here was generated by events far removed from Clemons or his alleged crime, but which by their very nature prejudiced Clemons' right to a fair trial. Appellant urges that a trial in Washington, D. C. on the charge of carrying a pistol in violation of the D.C. Code which was held during the brief period of Senator Kennedy's gunshot murder and funeral presented more than a reasonable likelihood that prejudicial news would prevent a fair trial. As the Supreme Court stated in the Sheppard case:

> "Where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates. . . ." (384 U. S. at 363.)

Twice a continuation was sought by Clemons' trial counsel and twice it was denied by the trial judge. Under the circumstances of this case denial of Appellant Clemons' motion for a continuance of the trial was prejudicial error and his conviction must therefore be reversed.

III. The Statute Creates an Unconstitutional Classification

The Government argues that the classification of prior conviction of any felony is reasonable in its application to Clemons because Clemons was previously convicted of robbery and was therefore within a limited classification plainly permissible under the Constitution. (Appellee's Brief, pp. 11-12). This is tantamount to arguing that an illegal search and seizure can be justified by what it "turns up." Where a statute is unconstitutional because of an unreasonable and arbitrary classification, it cannot be "selectively" constitutional for some members of the class and unconstitutional for

others. Clemons' conviction should therefore be reversed.

IV. The Confusion Between the Offense Charged in the Indictment, the Court's Instructions and the Evidence Deprived Clemons of a Fair Trial

The Government's brief succinctly sets forth the facts upon which Clemons bases an appeal:

> "Appellants were convicted of violating 22 D.C. Code §3204 which makes illegal the carrying of a pistol without a license, either openly or concealed on or about one's person. The Grand Jury had charged appellants with both, that is with carrying an unlicensed pistol openly and concealed about their persons. The trial judge in his charge followed the disjunctive language of the statute (Tr. 324), but a copy of the indictment with its conjunctive language was sent to the jury room (Tr. 319, 328)." (Brief for Appellee, p. 5).

The Government's brief justifies this practice on the ground that the indictment provided appellant with proper notice, was not vague and was "consonant with the general practice in the Federal courts." None of these contentions is directed to appellant's argument.

It is impossible to rely upon the same evidence to establish conduct which is both open and concealed. An indictment for carrying a weapon openly and concealed charges an impossibility unless there is evidence which supports both elements of the offense charged. See Kendrick v. United States, 99 U.S.App. D.C. 173, 238 F.2d 34 (D.C. Cir. 1956). It is undisputed that there could be no evidence to support such a dual finding in this case.

Moreover, appellant argues that the confusion between the terms of the statute and the indictment, and between the terms of the indictment and the instruction, engendered by the above factual recital prejudiced appellant's right to a fair trial.

Under these circumstances, appellant's conviction should be reversed.

V. Four Grounds of Reversal Urged by Appellant Blyther are Equally Applicable to Clemons

Each of the arguments urged on behalf of Appellant Blyther with respect to improper joinder,

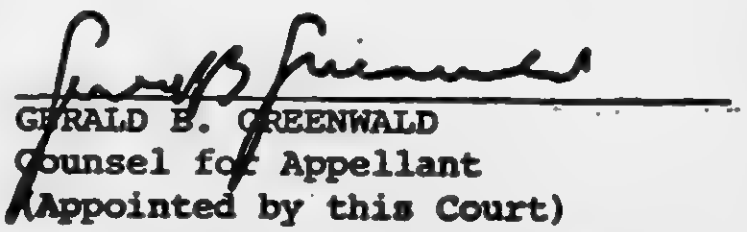
unlawful search and seizure and improper instructions are equally applicable to Appellant Clemons. Clemons joins in these arguments since reversal of Blyther's conviction upon any of these grounds would also require reversal of Clemons' conviction.

unlawful search and seizure and improper instructions are equally applicable to Appellant Clemons. Clemons joins in these arguments since reversal of Blyther's conviction upon any of these grounds would also require reversal of Clemons' conviction.

CONCLUSION

For the foregoing reasons, the maximum sentence supported by the record is one year, and Clemons' conviction of a misdemeanor should be reversed.

Respectfully submitted,



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CONCLUSION

For the foregoing reasons, Clemons' maximum sentence is one year and this misdemeanor conviction should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered by hand to the Office of the United States Attorney this 23d day of May 1969.

GERALD B. GREENWALD

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered by hand to the Office of the United States Attorney this 23rd day of May 1969.

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,344

UNITED STATES OF AMERICA,

Appellee,

v.

EMANUEL CLEMONS,

Appellant.

Appeal from a Judgment of the United States District Court for the District of Columbia.

BRIEF FOR APPELLANT

U.S. v. Cleary 204 F.2d 624 (3rd Cir. 1953)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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* Cases chiefly relied upon are marked by asterisks.

Constitutional Provisions and Statutes

ISSUES PRESENTED FOR REVIEW

1. Whether extraneous prejudicial publicity which influenced the jury deprived Clemons of his Fifth and Sixth Amendment rights to a fair trial.

2. Whether the confusion caused by the variances in the wording of the indictment, the Court's instruction, and the evidence offered by the prosecution invalidated Clemons' conviction.

3. Whether Clemons' sentence to imprisonment for up to ten years under 22 D.C.Code §3204 must be vacated because of

   a. The absence of any proof that Clemons had a prior felony conviction;

   b. The deprivation of Clemons' Fifth Amendment rights to due process and equal protection by reason of the arbitrary and unreasonable recidivist classification in the Statute.

Pursuant to U.S. Appeals D.C. Rule 8(d) this case has not been pending before this Court other than the Motion for Release mentioned at p. 2 infra.

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No.22,344

UNITED STATES OF AMERICA,

Appellee,

v.

EMANUEL CLEMONS,

Appellant.

Appeal from a Judgment of the United States District Court for the District of Columbia.

STATEMENT OF THE CASE.

An indictment was filed in the District Court for the District of Columbia on December 13, 1967, charging Defendent Clemons with a violation of 22 D.C. Code §3204 (carrying a dangerous weapon).

Clemons pleaded not guilty on December 29, 1967, was tried before Judge Gesell and a jury and was found guilty on June 10, 1968. On July 19, 1968, Clemons was sentenced to from three years to ten years imprisonment.

Application to Appeal without prepayment of costs was filed on August 1, 1968. By Order of the District Court of August 13, 1968, Clemons was authorized to appeal without prepayment of costs, and in the same Order, Judge Gesell authorized preparation of a transcript at Government expense.

Defendant Clemons submitted a written motion for release pending appeal on November 29, 1968 to the District Court which was denied by order of Judge Gesell on December 20, 1968. On January 14, 1969 a motion for release pending appeal was made to this Court and was denied by Judges Tamm and Leventhal on February 10, 1969.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

ARGUMENT

I. THE EXTRANEOUS PREJUDICIAL PUBLICITY WHICH INFLUENCED THE JURY DEPRIVED CLEMONS OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS TO A FAIR TRIAL.*/

Clemons was tried and convicted in an atmosphere of inherently prejudicial publicity generated by the gunshot murder of Senator Robert F. Kennedy two days before Clemons' trial began, an atmosphere which continued undiminished throughout Clemons' trial and conviction.

Thus Clemons was denied his Fifth and Sixth Amendment rights to a fair trial "by an impartial jury free from outside influences." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). Indeed, because of the public reaction of grief and anger to Senator Kennedy's senseless assassination there was such an "inherent danger of prejudice" that a showing of actual prejudice on the part of the jury is unnecessary in this case. See Sheppard, supra at 351-52.

Under these circumstances, the trial court

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*/ See p. 38 infra for portions of the Transcript which Defendant desires the Court to read.

had a duty to "take strong measures" to insure Clemons of his right to a fair trial. Id. at 362. The trial court failed to meet this burden. It's well-intentioned efforts were ineffective half-measures in the face of this national tragedy.

On June 6, 1968, at the opening of the trial Clemons' defense counsel moved for a continuance on these grounds, and the motion was denied by the Court:

> "MR. GARBER: Your Honor, on behalf of the Defendant Clemmons [sic], at this time I would move to continue this case for the following reasons:
>
> "The Defendant is charged in one count of the indictment with carrying a pistol without a license. Now, I am sure we are all well aware of the events that have transpired within the last forty-eight hours, particularly the event in California, in which the Senator from New York was shot. And simultaneously in point of time there was a multiple shooting in Georgetown.
>
> "The newspapers, as I have read them, have a great deal to say regarding weapons and guns. There have been numerous articles both in the Post and the Star regarding the passage of gun control laws. In the Star last night

there was a comment by Senator Dodd of Connecticut regarding the same subject matter. There have been numerous editorials.

"I submit that on the basis of the atmosphere which presently prevails that a defendant charged with carrying a pistol could not receive a fair and impartial trial at this time. On that basis it would seem hard for a jury to be able to erase from their minds, if they have read the news accounts and have seen the television accounts and listened to the radio accounts, the present controversy as it is regarding the carrying of pistols and gun control laws.

"I think that in view of the total atmosphere that now prevails in this country and in this city, itself, that out of an abundance of cautiin [sic] a trial of this nature should not be held at this time. Therefore, I would move for a reasonable continuance of this case on that ground.

"THE COURT: Your motion will be denied. You may inquire on such matters on voir dire in any fashion you choose.

"If this motion were a proper one, it would result in this Court ceasing to conduct its business. Practically every case in this Court at the present time before every active judge is a case involving someone who was armed with a pistol." (June 6, Tr. 2-3).

Defendant's trial counsel then attempted on voir dire to gauge whether any of the jurors were influenced by the gunshot slaying of Senator Kennedy to the extent that they could not be impartial in deciding a case in which defendant was charged with illegal possession of a handgun:

"MR. GARBER:

> "...Now, as the attorney for the United States has indicated to you, the charge in this case is carrying a dangerous weapon. Now, do any of you have such feelings about knives or guns or other weapons, especially in view of the events that have taken place within the last forty-eight hours -- do you have any such strong feelings about these matters that you feel you could not sit and fairly and impartially decide this case based upon the evidence in this trial and the law as given to you by the Court?
>
> (June 6, Tr.13)

The only response of the jurors to this question was silence.

Perhaps realizing how ineffective such procedure on voir dire was, Clemons' trial counsel on

the following morning renewed his motion for a continuance:

> "MR. GARBER: There is one matter which I want to call the Court's attention to in order to preserve my record. Of course Your Honor remembers yesterday I moved for a continuance of this matter because of the publicity regarding gun control legislation and the events that had occurred within the past few days. I think the matter has been compounded since we recessed yesterday.
>
> "I personally, by watching television last night, particularly Channel 9, especially between the hours of 8:00 and 9:00, that program was devoted to the ease by which guns could have been acquired, the manner in which they are used.
>
> "There were interviews with inmates at penitentiaries who admitted how they got guns and used them in holdups. On at least two occasions there were telecasts of the President of the United States regarding his views on gun control aspects of the crime bill.
>
> "The newspapers this morning, especially the Washington Post, repeats those stories. I see that one of the jurors has apparently a copy of the Washington Post with her.

"I just reiterate that the atmosphere at the present time is of such a nature that I don't see how jurors who would read these items in the newspaper or who had heard the programs on television would dismiss these factors from their mind.

"I would ask the Court to conduct a voir dire of the jury as to whether or not they did hear the portions of the telecast that I personally saw last night and, if they did, would it affect their ability to continue to sit as jurors in this trial.

"THE COURT: I will not do that.

"MR. GARBER: I would further ask that the jurors be asked if they either read or heard the statement of President Johnson on these matters and whether that would have affected their ability to continue to sit fairly and impartially in this case.

"THE COURT: I will deny your motion. I intend to cover this problem to the best of my ability with the charge." (June 7, Tr. 3).

The sole effort of the Court to protect defendant's right to a fair trial free of extraneous influences was the following instruction:

"When you were sworn as jurors in this case and questioned by counsel on the voir

> dire, you all indicated by your silence that you would be able to determine the facts in this case solely on the basis of the evidence and the law in this case without reference to any other matters, including some of the references to guns which have been carried in the newspapers and on TV in recent days. I ask you to remember and abide by your pledge in that regard.
>
> "These Defendants are to be tried on the evidence in this case and the law as I instruct you and on nothing else. Your determination of the guilt or innocence of a defendant must be reached solely on the basis of the relevant evidence adduced at this trial without any feeling or emotion, bias or prejudice, without any anger on the one hand and without any sympathy on the other.
>
> "Your sole function is to determine whether or not the evidence adduced proves the Defendants' guilt beyond a reasonable doubt. If the jury permits any feelings of bias or prejudice or any feeling of sympathy to enter into their determination of its verdict, then the jury is not properly performing its function and justice is not done." (June 10, Tr. 326-327).

These instructions came at the close of the trial on Monday, June 10, following the weekend release of the jurors who had been exposed to

the extensive and in-depth treatment by television, radio and newspapers of Senator Kennedy's wake and funeral, his brother's poignant eulogy, and the clamor for gun control laws. Nor was the jury cautioned when the trial recessed on Friday afternoon not to watch their televisions, listen to their radios, or read their newspapers. Indeed, we recognize on this appeal that such an admonition would, under the circumstances, have done little to protect Clemons from the subtle and prejudicial influences upon his trial of the Nation's shock and grief.

The trial court, having failed to discharge its duty under Sheppard, supra, to safeguard the Defendant's trial from inherent prejudicial publicity, the Supreme Court has placed upon this Court, "the duty to make an independent evaluation of the circumstances." Sheppard, supra at 36. The Court must now make its own evaluation of the following chronology of events and commentary which saturated the news media during Clemons' trial:

	The Assassination of Senator Kennedy	The Trial of Emanuel Clemons
June 5	Senator Kennedy shot critically after California victory and suffers two head wounds.	Eve of Clemons' trial.
June 6	Robert Kennedy dies of gunshot wounds; President Johnson on national television demands end to violence, appoints Commission to study "lawlessness and violence in our country," demands stringent gun controls to end "the insane traffic" in guns; 3 men arrested following multiple slaying in Georgetown; President Johnson orders Secret Service protection for presidential candidates; History of gun used to kill Senator Kennedy publicized; Army riot unit alerted; House votes on Anti-Crime Bill "stirred by the shooting of Senator Robert F. Kennedy"; Extensive diagrams and reports regarding Sen. Kennedy's head wounds appear in	Trial opens; Clemons' motion for reasonable continuance is denied; Jury when questioned on voir dire whether they could be impartial in light of events of previous 48 hours are silent.

	the press; Reflections on deaths of John F. Kennedy, Martin Luther King, Jr., and Robert F. Kennedy are seen on television, heard on the radio and read in the newspapers.	
June 7	Congress passes the Anti-Crime bill, but Pres. Johnson calls its gun curb provisions weak; Senator Kennedy is to be buried in Arlington; The body of Senator Kennedy is flown to New York for wake and funeral service; A California jury indicts the suspected assassin; Memorial pictures appear in papers replacing normal commercial advertising.	Clemons' request for reasonable continuance is renewed and denied; Trial is recessed for weekend.
June 8	Thousands view Senator Kennedy's body in New York where funeral is held; The anguished eulogy of Senator Edward M. Kennedy is televised; The funeral train travels slowly to Washington for the Arlington burial; The suspected gunshot killer of Martin Luther	Weekend recess of trial.

	King, Jr. is arrested in London; Several mourners are killed accidentally by funeral train as thousands mass alongside train tracks to watch the train pass; The body is buried at Arlington; The entire day's events televised.	
June 9	Extensive reporting and review of previous week's events with comment by newspapers, television and radio.	Weekend recess of trial.
June 10	Extensive reporting and review of previous week's events by newspapers, television, and radio.	Trial resumes; Jury instructed to disregard previous week's events; Clemons convicted.

Thus, time stood still in the nation for five days as it was outraged, numbed and angered by the savage, abrupt taking from its midst of one of its most promising young public servants. No one could help but be affected as everyone had been by the assassinations of President John F. Kennedy and Martin Luther King, Jr. As Senator Robert F. Kennedy, himself, by quoting Aeschylus, had counseled the heartbroken

people of an Indianapolis neighborhood following the murder of Martin Luther King:

> "Even in our sleep, pain
> which cannot forget falls
> drop by drop upon the heart
> until in our own despair, against our
> will, comes wisdom through the
> awful grace of God."

N.Y. Times, April 5, 1968, p. 33.

Until that pain had been softened and dissipated by the healing effects of time, Clemons could not face trial without the inherent danger that his trial would be tainted by prejudicial influences over which neither he, the jury, nor the Court could exercise control.

The trial court sought to deal with these circumstances in two ways, first as a matter of voir dire conducted solely by Clemons' defense counsel, and second, by instructions to the jury. Neither was adequate to assure Clemons a fair trial by an impartial jury free from outside influence.

The voir dire examination as to the prejudicial publicity produced only silence on the part of the jurors. It is questionable whether such

silence correctly reflected each juror's ability to judge Clemons' guilt objectively. As the Supreme Court observed in Irvin v. Dowd, 366 U.S. 717 (1961):

> "No doubt each juror was sincere when he said that he would be fair and impartial to the petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father."

Id. at 728.

Instructions to jurors to give no heed in their deliberations on the evidence to inflammatory publicity or other prejudicial extraneous influences are strongly suspect. Mr. Justice Jackson has demeaned such instructions as "unmitigated fiction."[1/] Judge Frank expressed his skepticism of such instructions when he said that telling a juror to disregard something is like telling a small boy to stand in a corner and not to think of a white elephant.[2/]

1/ "The naive assumption that prejudicial effects can be overcome by instructions to the jury... all practicing lawyers know to be unmitigated fiction."
Krulewitch v. United States, 336 U.S. 440, 453 (1949) (Jackson, J. concurring).

2/ United States v. Leviton, 193 F.2d 848, 865 (2d Cir. 1951) cert. denied, 343 U.S. 946 (1952).

A continuance, however, would have been a particularly simple and practical means of safeguarding defendant's rights to a fair trial. The Supreme Court has observed that "where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates ..." Sheppard, supra at 363. The prejudicial publicity in this case was not the kind which would always have been attracted to Clemons' trial and which, therefore, could never have been avoided. Here the prejudice caused by public indignation, grief and shock and by the clamor for prompt gun control legislation dissipated within a reasonable time after Senator Kennedy's assassination.

For these reasons the trial court's failure to grant defendant's motion for a continuance of the trial was prejudicial error, and the conviction must therefore be reversed.

II. THE CONFUSION CAUSED BY THE VARIANCES IN THE WORDING OF THE INDICTMENT, THE COURT'S INSTRUCTION, AND THE EVIDENCE OFFERED BY THE PROSECUTION INVALIDATED CLEMONS' CONVICTION.*/

Clemons was charged in the Grand Jury Indictment with a violation of Title 22 of the District of Columbia Code, section 3204 which provides in pertinent part:

> "No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided,..."

The statute makes it a misdemeanor to carry a pistol "either openly or concealed." The Grand Jury indictment, however, charged Clemons as follows:

> "On or about September 29, 1967, within the District of Columbia, Emanuel Clemons did carry, openly and concealed on or about his person, a dangerous weapon, capable of being so concealed, that is, a pistol, without a license therefor issued as provided by law." (emphasis added)

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*/ See p. 38 infra for portions of the Transcript which Defendant desires the Court to read.

The trial jury was given a copy of the indictment to take to the jury room with them. (June 10, Tr. 319 and 328)

The Court, in its instruction to the jury on the essential elements of the crime returned to the disjunctive language of the statute:

> "First, that the Defendant carried <u>either</u> openly <u>or</u> concealed on or about his person a pistol, second, that he so carried the pistol in a place other than his home, place of business, or on other land possessed by him." (emphasis added) (June 10, Tr. 34)

The problem raised by this variance is the impossibility of determining whether the Grand Jury thought Clemons had carried a dangerous weapon both "openly <u>and</u> concealed" or whether the Grand Jury considered that on the basis of evidence presented to it Clemons was guilty of carrying it once openly and again concealed or whether they thought that both openness and concealment were necessary to the commission of the crime. The trial jury faced not only these same questions but the additional confusion presented

by the trial court's instructions of the elements of the offense which were phrased in the disjunctive of the Statute rather than the conjunctive of the indictment.

This Court in Kendrick v. United States, 99 U.S.App. D.C. 173, 238 F.2d 34 (D.C.Cir. 1956) considered the same infirmity in an indictment under the same statute (22 D.C. Code §3204) from the aspect that the indictment charged an impossibility. The Court said,

> "It is argued that the pistol-carrying count of the indictment was defective in that the conjunctive 'and,' instead of the statutory disjunctive 'or,' was used in charging that Kendrick 'did carry openly and concealed a dangerous weapon.' The point sought to be made is that the count charged an impossibility. There was, however, proof tending to show the weapon was concealed when Kendrick approached the scene of the shooting and then was produced and carried openly."

99 U.S. App. D.C. at 176.

The record in this case provides no such easy disposition of the issue of impossibility, as there is no evidence that Clemons ever moved or touched the gun,

or even that he had actual knowledge that the gun was in the car. If he "carried" the gun at all he could have done it in only one way unless the plain meaning of the words are ignored.[3/]

The problem of patent impossibility raised in Kendrick is not, however, the only infirmity with which we are concerned. Clemons was also prejudiced by the confusion in determining the crime for which the Grand Jury indicted Clemons, or the crime for which the Trial Jury convicted him. The Trial Judge's charge to the Jury which varied the terms of the indictment did not clarify the situation; rather, it added an element of further confusion.

It is well settled that requirements of the indictment must be strictly adhered to. In his concurring opinion in Jovner v. United States, 116

3/ The only testimony linking Clemons to possession of the pistol is Officer Neer's testimony that:

> "Lying on the floor [of the automobile] immediately at the feet of the Defendant Mr. Clemmons [sic], I found a revolver." (June 6, Tr. 27)

U.S. App. D.C. 76, 320 F.2d 798 (D.C. Cir. 1963) Chief Judge Bazelon noted that it is improper to consider evidence adduced at the trial in determining whether the Grand Jury found facts sufficient to constitute the crime. (320 F.2d at 799.) The danger to be avoided was described by Mr. Justice Stewart in Russell v. United States, 369 U.S. 749 (1962) as follows:

> "To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." 369 U.S. 749, 770.

Although the Court in Joyner, affirmed the District court on the basis that the attack on the indictment was not timely raised, the better view is stated in the more recent case of Crosby v. United States, 119 U.S. App. D.C. 244, 339 F.2d 743 (D.C. Cir. 1964). In Crosby the Court noted that the indictment is at

the heart of the Court's jurisdiction, explaining,

> "The Government asserts, in effect, that appellant has waived his right to be charged by a grand jury for the precise offense of which he was convicted. We cannot agree. The scope of the indictment goes to the existence of the trial court's subject-matter jurisdiction."

339 F.2d at 744.

The Supreme Court has ruled that a high degree of compliance with the procedural requirements of an indictment is required and that no laxity on the part of the trial court can be tolerated. In Ex parte Bain, 121 U.S. 1 (1886), the Supreme Court held that only the grand jury could change the crime charged in its indictment, and that the trial court could not amend an indictment. Mr. Justice Miller speaking for the Court said:

> "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says 'no person shall be held to answer,' may be

> frittered away until its value is almost destroyed." 121 U.S. 1, 10.
>
> The Court went on to hold in Bain:
>
> "that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney...." 121 U.S. 1, 13.

This reasoning and holding was quoted with approval by the Supreme Court as recently as 1960 in Stirone v. United States, 361 U.S. 212 (1960).

If Clemons was convicted of carrying a dangerous weapon openly or concealed as the Court charged, he was not convicted of the crime charged by the grand jury indictment. If Clemons were convicted of carrying a dangerous weapon both openly and concealed, he was not convicted in accordance with any possible combination of facts discernible from the record since the only evidence linking Clemons to carrying of the pistol was the arresting officer's testimony that "Lying on the floor [of an automobile] immediately at the feet of the Defendant Mr. Clemmons

[sic], I found a revolver." (June 6, Tr. 27)

Neither the trial court nor this Court may substitute its judgment for those of the grand jury and trial jury. Apart from the logical impossibility alleged in the indictment, the presence of such confusion indicates the absence of the fair trial to which every defendant is entitled. The conviction must therefore be reversed.

III. CLEMONS' SENTENCE TO IMPRISONMENT FOR UP TO TEN YEARS UNDER 22 D.C. CODE §3204 MUST BE VACATED.*/

A. THE PROSECUTION FAILED TO PRESENT ANY EVIDENCE THAT CLEMONS HAD A PRIOR FELONY CONVICTION.

Information of a prior conviction of Clemons was brought to the District Court's notice after conviction and prior to sentencing, in the following paper filed with the Court on June 25, 1968, and served by mail on Clemons' trial counsel:

> "The United States Attorney for the District of Columbia informs the Court as follows:
>
> 1. That on June 10, 1968, one Emanuel Clemons was found guilty in the above-captioned case of carrying a deadly weapon on or about September 29, 1967, an offense proscribed by 22 D.C.C. Sec. 3204, and is now awaiting sentence of the Court;
>
> 2. That the said Emanuel Clemons is the same Emanuel Clemons who was convicted in the District of Columbia on May 29, 1958 in the United States District Court for the District of Columbia for the offense of robbery, 22 D.C.C., Sec. 2901, Criminal Case No.

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*/ See p. 38 infra for portions of the Transcript which Defendant desires the Court to read.

1162-57;

3. That the offense of carrying a deadly weapon is punishable by imprisonment for not more than ten years, when committed by a defendant who prior to his commission of that offense has been convicted in the District of Columbia of robbery.

4. In consideration of the foregoing, the Court is advised that said defendant in the above-captioned case may be sentenced to imprisonment for a term as long as but not more than 10 years."

Three weeks later, on July 19, 1968 Clemons was sentenced by the District Court. During the hearing on sentencing no mention whatsoever of the information of prior conviction was made by District Judge Gesell, the Assistant United States Attorney or Clemons' trial counsel. Clemons' allocution in the District Court consisted in its entirety of the following exchange:

"The Court: Anything you wish to say, Mr. Clemons:

Defendant Clemons: No, Sir.

The Court: The Court will sentence you three to ten years." (July 19, Tr.2)

In this case the District Court increased Clemons' sentence ten-fold from imprisonment for a maximum of one year under the misdemeanor statute to a maximum of ten years for a felony without any testimony or document concerning prior conviction being offered in evidence by the prosecution.

Clemons' sentencing plainly violated not only fundamental principles of due process but also the explicit rationale of this Court's decision in Jackson v. United States, 95 U.S. App. D.C. 328, 221 F.2d 883 (D.C. Cir. 1955).

As this Court pointed out in Jackson, in the absence of waiver there can be no substitute for

> "actual proof of a fact which so drastically increases the maximum imprisonment. Such proof which so largely shapes the sentence should be introduced in the defendant's presence, just as the sentence itself must be pronounced in his presence." (emphasis added)

(95 U.S. App. D.C. at 330).

The mere filing and serving by the prosecution of a notice of information of prior conviction does not shift the burden from the prosecution to the defense. The notice itself is in no sense proof. It serves only to notify the District Court and defense counsel that the prosecution intends to offer proof of prior conviction at the sentencing hearing. If the prosecution relies upon the notice to establish its case then it must offer the notice in evidence in the same manner as any other document after proper foundation, appropriate cross examination and defendant's opportunity for rebuttal or refutation. Moreover, such a hearing is essential to the assertion of defendant's recognized right to attack collaterally the validity of a prior conviction relied upon by the prosecution for the purpose of increasing defendant's sentence. See Reynolds v. Cochran, 365 U.S. 525, (1961). Chandler v. Fretag, 348 U.S. 3 (1954).

None of these procedural or substantive protections were afforded Clemons in this case. It

cannot be held here, as the Court held under the facts present in Kendrick v. United States, 99 U.S. App. D.C. 173, 176, 238 F.2d 34, 37 (1956), that these procedural and substantive protections are "an idle formality". In this case, unlike Kendrick, the defendant did not admit in his testimony to a prior felony conviction, nor did the trial judge have any personal knowledge of defendant's prior convictions aside from the notice filed by the prosecution.

For the foregoing reasons, Clemons' sentence should be vacated in favor of a sentence of one year, the maximum authorized by the statute in the absence of proof of a prior felony conviction. 22 D.C.Code §3215.

B. CLEMONS WAS DEPRIVED OF HIS FIFTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION BY REASON OF THE ARBITRARY AND UNREASONABLE RECIDIVIST CLASSIFICATION IN THE STATUTE.

It is recognized that in general the constitutionality of statutes inflicting severe criminal penalties upon habitual offenders is no longer open to

serious challenge. However, the classification enacted by Congress in the D.C. gun statute is not that commonly enacted in habitual offender statutes. Rather, it is an unconstitutional classification so unreasonable and arbitrary as to constitute a denial to Clemons of equal protection[4/] and due process. The constitutionality of the statute has been summarily upheld in Kendrick v. United States, 99 U.S. App. D.C. 173, 238 F.2d 34 (D.C. Cir. 1956), but the consideration of equal protection and due process in the Kendrick case was at best slight and should not preclude a more searching examination of the statute at this time.

4/ The Fifth Amendment as applied to the District of Columbia implies equal protection of the laws. Sims v. Rives, 66 U.S. App. D.C. 24, 84 F.2d 871 (D.C. Cir. 1936); Hamilton National Bank v. D.C., 85 U.S. App. D.C. 109, 176 F.2d 624, (D.C. Cir.) cert. denied, 338 U.S. 891 (1949). A recent opinion of a three-judge District Court, Harrell v. Tobriner, 279 F. Supp. 22, 25 (D.D.C. 1967) reaffirmed saying: "Denial of equal protection offends the Due Process Clause of the Fifth Amendment, applicable to this jurisdiction..."

It is no longer enough to say that Clemons was granted equal protection because the punishment he received "is dealt out to all alike who are similarly situated." Moore v. Missouri, 159 U.S. 673,678 (1895). To ignore the lack of protection afforded to the members of the class itself is to give only lip service to the constitutional mandate of equal protection and due process. The attack here is more than a challenge based on a lack of "general fairness." Rather, it is based on the lack of defensible classification mandated in the statute.

To evaluate this classification, it is germane to consider the offense itself. The possession of dangerous weapons is so accepted in our society as to have its practice enshrined in constitutional protection by some commentators. As a practical matter, the carriage of hand guns in the District of Columbia is almost always "unauthorized." It disregards reality to speak of licensing a hand gun in the District of Columbia, as we are advised that there are only 25 valid permits in the whole of the District of Columbia

at the present time. But, notwithstanding the serious nature of the crime, Congress has seen fit to make unauthorized possession of a dangerous weapon a misdemeanor rather than a felony. It is the magnification of this misdemeanor into a felony which is under attack here. Having limited punishment of the offense of unauthorized possession of a dangerous weapon to a maximum imprisonment of one year, this Court should examine closely the Constitutional basis for increasing that penalty ten-fold in this case.

Commonly, a recidivist statute is either a separate statute which provides a mandatory sentence for felons who have previous felony convictions or one which increases punishment for second offenders of the same crime. This in part is what Congress sought to do in the D.C. gun statute under which Clemons was convicted. But Congress went further. In effect, it classified as recidivists not only those persons previously convicted within the jurisdiction of unauthorized possession of a dangerous weapon, but

also those persons previously convicted within the jurisdiction of any felony whatsoever at any time whatsoever prior to conviction under the gun statute.

There is no defensible correlation between the commission of the misdemeanor of unauthorized possession of a dangerous weapon and the commission of any other crime which Congress has made punishable by imprisonment for more than one year. Within the ambit of felonies are crimes of violence in which a dangerous weapon is used, crimes of violence in which no dangerous weapon is used, and crimes of a thoroughly non-violent nature. A perusal of Title 18, U. S. Code, reveals as felonies the following crimes: concealment of assets by a bankrupt (§ 152), bribery (§ 201), counterfeiting (§ 471), violations of the customs laws (§§541-552) and the Corrupt Practices Act (§§ 607-609), embezzlement (§641), false personation (§§ 911-915), fraud (§ 1001), mailing obscene matter (§ 1461), perjury (§ 1621), and violations of the Mann Act (§ 2421). Any of these felony convictions within the District

of Columbia could increase ten-fold the punishment for unauthorized possession of a dangerous weapon. Moreover, a prior felony conviction can increase ten-fold the punishment for unauthorized possession of a dangerous weapon, whenever the previous felony was committed at any prior time within the defendant's lifetime. Jeopardy of this nature exceeds the bounds of any reasonable classification required for the protection of society against unauthorized possession of dangerous weapons.

For these reasons Clemons' sentence should be vacated, and the case remanded to the District Court with instructions to impose a sentence no greater than the one-year maximum authorized by Statute for conviction of a misdemeanor.

CONCLUSION

For the foregoing reasons, the conviction of Clemons should be reversed and his sentence vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been delivered by hand to the Office of the United States Attorney this 11th day of March, 1969.

GERALD B. GREENWALD

ADDENDUM

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Title 22 of the District of Columbia Code, section 3204, provides:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house of place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in section 22-3215, unless the violation occurs after he has been convicted in the District of Columbia of a violation of this section or of a felony, either in the District of Columbia or in another jurisdiction, in which case he shall be sentenced to imprisonment for not more than ten years.

Title 22 of the District of Columbia Code, section 22-3215, provides:

> Any violation of any provision of this chapter for which no penalty is specifically provided shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or both.

Statement Pursuant to Rule 17(c)(2)(iii) of U.S. Appeals D.C. Rules.

Defendant desires the Court to read the following portions of the Reporter's transcript with respect to

Argument One: June 6, Tr. 2-3

June 7, Tr. 3

June 10, Tr. 326-327

Argument Two: June 10, Tr. 34

June 6, Tr. 27

Argument Three: July 19, Tr. 1-3